

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEN WALTERS, et al.,

No. C 04-5084 VRW (MEJ)

Plaintiff(s),

vs.

WORLD SWEEPING, INC.,

**REPORT AND RECOMMENDATION  
RE: PLAINTIFFS' MOTION TO  
DETERMINE THE AMOUNT OF  
DAMAGES**

Defendant(s).

**I. INTRODUCTION**

Before the Court is Plaintiffs' Motion to Determine the Amount of Damages, filed on January 26, 2006. Doc #32. After consideration of Plaintiff's papers, Chief Judge Walker's previous default judgment order in this matter, the applicable statutory and case law authorities, and good cause appearing, the Court hereby RECOMMENDS that the District Court order Defendant to pay Plaintiffs the following: (1) \$11,527.39 in unpaid fringe benefits; (2) \$1,753.45 in liquidated damages; (3) \$1,146.01 in interest - minus a credit of \$1,104.00, for a total amount due of \$13,322.85; and (4) an additional \$1,462.50 in attorney's fees and \$79.50 in costs related to the instant motion.

**II. BACKGROUND**

Plaintiffs, which are various employee trust funds and their respective trustees, brought this ERISA action on December 1, 2004, alleging that defendant World Sweeping, Inc. ("Defendant") violated a collective bargaining agreement ("CBA") and various trust agreements (Doc #19, Ex B; Doc #22) by not paying fringe benefit contributions to the trust funds and not submitting to an audit.

1 Doc #1. Although served on December 15, 2004 (Doc #3), Defendant never filed an answer or  
2 responsive pleading, and the Clerk of Court entered default on March 30, 2005. Doc #14.

3 On June 13, 2005, Plaintiffs filed a Motion for Default Judgment (Doc #17), which the  
4 Honorable Chief Judge Vaughn R. Walker granted on January 6, 2006. Doc #30. In granting  
5 Plaintiffs' motion, Chief Judge Walker: (1) ordered Defendant to pay Plaintiffs' \$3,692.50 in  
6 attorneys' fees and \$234.50 in costs; (2) enjoined Defendant to submit to an audit of its books and  
7 records, as required by the CBA and trust agreements, and to pay the amount due under the audit,  
8 plus interest; (3) permanently enjoined Defendant to submit all monthly contribution reports and  
9 payments required under the CBA and trust agreements; and (4) ordered Defendant to provide  
10 Plaintiffs with an accounting of Defendant's transactions with Plaintiffs. *Id.* Chief Judge Walker  
11 also referred this matter to a magistrate judge for a report and recommendation to determine the  
12 amount, if any, that Defendant owes plaintiffs for fringe benefit contributions, liquidated damages  
13 and interest. *Id.*

14 On January 26, 2006, Plaintiffs filed a Motion to Determine the Amount of Damages (Doc  
15 #32), as well as the Declaration of Nicole M. Phillips (Doc #33) and Wayne McBride (Doc #36) in  
16 support thereof. Defendant filed no opposition. On March 2, 2006, the Court held a hearing on the  
17 matter. Nicole Phillips appeared on behalf of Plaintiffs. Defendant made no appearance.

### 18 III. DISCUSSION

#### 19 A. Unpaid Benefit Contributions

20 In their complaint, Plaintiffs seek unpaid contributions in the amount of \$11,527.39. These  
21 contributions were calculated based on amounts set out in the Operating Engineers Local Union No.  
22 3 Sweeper Agreement for Northern California ("Sweeper Agreement"), which Defendant signed on  
23 August 13, 2002. Decl. of Wayne McBride, Doc #36, ¶4, Ex. B. Section 6.01.00 of the Sweeper  
24 Agreement requires that employers contribute into each of the Plaintiff Trust Funds at specified rates  
25 for each hour worked by employees performing work covered by the collective bargaining  
26 agreement. *Id.* The Sweeper Agreement also lists the applicable rates into each of the Plaintiff  
27 Trust Funds. For example, Section 6.02.00 sets the rate of benefit contributions into the Health and  
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1 Welfare Plan. Section 6.02.01 sets the rate for benefit contributions into the Pensioned Health and  
2 Welfare Plan, etc. *Id.*

3 In or around March 2004, the Trust Funds' auditor, Hemming Morse, conducted an audit of  
4 Defendant. On April 17, 2004, Hemming Morse created a Summary of Liabilities detailing the  
5 amounts owed by Defendant. *Id.* at ¶10, Ex. C. The audit report revealed that Defendant employed  
6 employees performing work covered under the Sweeper Agreement between August 15, 2002 and  
7 September 2003, and underreported to the Trust Funds on hours performed by their employees. The  
8 audit revealed that between October 2002 and December 2002, Defendant failed to report 247.50  
9 hours worked by its employees and failed to make the following contributions: \$1,163.25 to the  
10 Health and Welfare Trust Fund at a rate of \$4.70 an hour, \$269.78 to the Pensioned Health and  
11 Welfare Trust Fund at a rate of \$1.09 an hour, \$990.00 to the Pension Fund at a rate of \$4.00 an  
12 hour, \$153.45 to the Affirmative Action Training Fund at a rate of \$0.62 an hour, \$99.00 to the  
13 Annuity Trust Fund at the rate of \$0.40 an hour, and \$61.88 to the Industry and Stabilization Trust  
14 Fund at a rate of \$0.25 an hour, for a total of \$3,340.34 in delinquent contributions, plus  
15 supplemental dues and vacation pay in the amount of \$804.38, \$556.50 in 12% interest, \$602.99 in  
16 15% liquidated damages, for a total of \$4,701.22. The auditor deducted \$1,104.00 for over-reported  
17 hours, for a total of \$3,597.22. *Id.* ¶11, Ex. C.

18 The audit also revealed that between January 2003 and December 2003, Defendant failed to  
19 report 535.50 hours worked by its employees and failed to make the following contributions:  
20 \$1,828.35 to the Health and Welfare Trust Fund at a rate of \$5.10 an hour, \$534.17 to the Pensioned  
21 Health and Welfare Trust Fund at a rate of \$1.49 an hour, \$2,142.00 to the Pension Fund at a rate of  
22 \$4.00 an hour, \$222.27 to the Affirmative Action Training Fund at a rate of \$0.62 an hour, \$143.40  
23 to the Annuity Trust Fund at the rate of \$0.40 an hour, and \$89.63 to the Industry and Stabilization  
24 Trust Fund at a rate of \$0.25 an hour, for a total of \$3,340.34 in delinquent contributions, plus  
25 supplemental dues and vacation pay in the amount of \$1,176.23, \$589.51 in 12% interest, and 15%  
26 liquidated damages in the amount of \$1,150.46, for a total of \$9,725.63. *Id.* at ¶12, Ex. C.

27 According to the auditor's Summary of Liabilities, the total amount of delinquent  
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1 contributions for 2002 and 2003 is \$11,527.39 in fringe benefits, \$1,753.45 in liquidated damages,  
2 and \$1,146.01 in interest, for a total of \$14,426.85, minus \$1,104.00 for over-reported hours, for a  
3 grand total of \$13,322.85. *Id.* at Ex. C.

4 **B. Liquidated Damages**

5 Liquidated damages are authorized under the Sweeper Agreement, as well as the Trust  
6 Agreements establishing the Trust Funds, where the employer has failed to make timely benefit  
7 contributions, not as a penalty, but as a reasonable attempt to cover damages incurred by the Trust  
8 Funds. *Id.* at Ex. B. Pursuant to Section 07.01.00 of the Sweeper Agreement, the Trust Funds may  
9 assess liquidated damages against delinquent employers because the regular and prompt payment of  
10 amounts due each Trust is essential and, in light of the substantial but varied expense incurred in the  
11 administration of the Trusts due to delinquencies, it is extremely difficult, if not impracticable to fix  
12 the payments in full within the time provided. *Id.* By signing the Sweeper Agreement, Defendant  
13 agreed that the amount of damage resulting from any failure to pay would be by way of liquidated  
14 damages, and not as a penalty to each Trust, in the amount of \$35.00 or 15% of the amount due and  
15 unpaid to each such Trust, whichever is greater. *Id.* at Ex. B, Section 07.01.00.

16 Further, a trust fund may collect liquidated damages under ERISA Section 515, 29 U.S.C. §  
17 1145. Contractual liquidated damages are valid so long as the harm caused by a breach is difficult  
18 or impossible to estimate, and the amount fixed is a reasonable forecast of just compensation for the  
19 harm caused. *Idaho Plumbers and Pipefitters Health and Welfare Fund v. United Mechanical*  
20 *Contractors*, 875 F.2d 212, 217 (9th Cir. 1989). The parties' intentions determine whether this  
21 second requirement is satisfied - they must make a good faith attempt to set an amount equivalent to  
22 the damages they anticipate. *Id.*

23 Here, the current rate of 15% was set both by the Sweeper Agreement and by the Board of  
24 Trustees. *McBride Decl.*, ¶5, Ex. B. The liquidated damages provision in the Sweeper Agreement  
25 covers the time frame during which contributions became due and owing, and such provision was  
26 collectively bargained by all parties. *Id.*, ¶4, Ex. B. As Defendant was delinquent in payment of  
27 Trust Fund contributions between August 2003 and December 2004, the Court finds \$1,753.45 in  
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1 liquidated damages and \$1,146.01 in interest appropriate per Section 07.01.00 of the Sweeper  
2 Agreement.

3 **C. Attorney's Fees and Costs**

4 In his January 6 Order, Chief Judge Walker referred this matter for a determination of the  
5 amount owed in fringe benefit contributions, liquidated damages, and interest. However, as part of  
6 their motion, Plaintiffs request an additional \$1,962.50 in attorneys' fees and \$79.50 in costs in  
7 connection with the present motion. Given the additional briefing and court appearance by Plaintiffs  
8 since Judge Walker's order, the Court finds it appropriate to consider Plaintiffs' request. Under  
9 Section 07.01.02 of the Sweeper Agreement, Plaintiffs are entitled to an award of attorneys' fees and  
10 costs. Doc #36, Ex. B. Further, Plaintiffs have provided sufficient evidence to support their request  
11 for fees and costs, both of which appear to be reasonable. Doc #33. One exception, however, is the  
12 \$450 request for "Review of Opposition, legal research, preparation, and filing of Reply brief." *Id.*  
13 at 2:12. As no opposition was filed, an award of \$450 is inappropriate. Accordingly, the Court  
14 recommends an award of \$1,462.50 in attorneys' fees and \$79.50 in costs.

15 **IV. CONCLUSION**

16 Based on the foregoing analysis, the Court hereby RECOMMENDS that the District Court  
17 order Defendant to pay Plaintiffs the following: (1) \$11,527.39 in unpaid fringe benefits; (2)  
18 \$1,753.45 in liquidated damages; (3) \$1,146.01 in interest - minus a credit of \$1,104.00; (4)  
19 \$1,462.50 in attorneys' fees; and (5) \$79.50 in fees.

20 Pursuant to Federal Rule of Civil Procedure 72(a), Defendant may serve and file objections  
21 to this Report and Recommendation within ten days after being served with a copy of it; Defendant  
22 may not thereafter assign as error a defect in the report to which objection was not timely made.

23 **IT IS SO RECOMMENDED.**

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25 Dated: March 2, 2006

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28 MARIA-ELENA JAMES  
United States Magistrate Judge